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7050-01-P

LEGAL SERVICES CORPORATION

45 CFR Part 1611

Financial Eligibility

AGENCY: Legal Services Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Legal Services Corporation ("LSC" or "Corporation") is republishing for additional comment previously proposed amendments (with certain additional revisions) to its regulations relating to financial eligibility for LSC-funded legal services. The proposed revisions are intended to reorganize the regulation to make it easier to read and follow; simplify and streamline the requirements of the rule to ease administrative burdens faced by LSC recipients in implementing the regulation and to aid LSC in enforcement of the regulation; and to clarify the focus of the regulation on the financial eligibility of applicants for LSC-funded legal services.

DATES: Comments must be submitted on or before [insert date 30 days from date of publication].

ADDRESSES: Comments must be submitted in writing and may be sent by regular mail, or may be transmitted by fax or email to: Mattie C. Condray, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K. St., NW, Washington, DC 20007-3522; (202) 337-6519 (fax); mcondray@lsc.gov (email).

FOR FURTHER INFORMATION CONTACT: Mattie C. Condray, Senior Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, 3333 K. St., NW, Washington, DC 20007-3522; (202) 295-1624 (phone); (202) 337-6519 (fax); mcondray@lsc.gov (email).

SUPPLEMENTARY INFORMATION: Section 1007(a) of the Legal Services Corporation Act requires LSC to establish guidelines, including setting maximum income levels, for the determination of applicants' financial eligibility for LSC-funded legal assistance. Part 1611 implements this provision, setting forth the requirements relating to determination and documentation of client financial eligibility.

Procedural Background

On June 30, 2001, LSC initiated a Negotiated Rulemaking and appointed a Working Group comprised of representatives of LSC (including the Office of Inspector General), the National Legal Aid and Defenders Association, the Center for Law and Social Policy, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants and a number of individual LSC recipient programs. The Negotiated Rulemaking Working Group met

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three times throughout 2002 and developed a Draft Notice of Proposed Rulemaking (NPRM) which was the basis for the NPRM published by LSC on November 22, 2002 proposing significant revisions to Part 1611 (67 FR 70376). LSC received 15 comments on that NPRM. Except as specifically noted in the Section-by-Section analysis below, the comments LSC received either affirmatively supported or raised no objection to the proposals in the November 2002 NPRM.¹

Upon receipt of the comments, LSC staff prepared a Draft Final Rule discussing the comments and making permanent the proposed revisions. However, on the eve of the January 31 – February 1, 2003 Board of Directors meeting at which the Draft Final Rule was scheduled to be considered, LSC received a request from Representative James Sensenbrenner, Chairman of the U.S. House of Representatives Judiciary Committee, to suspend action on the rulemaking pending the confirmation of new LSC Board of Directors members appointed by President Bush. The then-LSC Operations and Regulations Committee deferred to Chairman Sensenbrenner's request. After the confirmation of the nine newly appointed Board members, the reconstituted Operations and Regulations Committee further deferred action on the rulemaking pending the appointment of a new LSC President. After the arrival of the new LSC President in January 2004, the reconstituted Operations and Regulations Committee resumed consideration of the Part 1611 rulemaking.

At its meetings of May 1, 2004, June 5, 2004 and September 11, 2004, the Operations and Regulations Committee discussed and provided policy direction to staff on the two aspects of the proposed changes to the regulations about which LSC and the field had failed to achieve consensus during the Working Group meetings – retainer agreements and group representation. The Committee reviewed these proposals and the remainder of the proposed revisions to Part 1611 at its meeting of April 1, 2005. At the meeting of the full Board of Directors on May 1, 2005, upon the recommendation of the Committee, the Board determined that because two years has passed since the publication of the November 2002 NPRM, rather than adopting a final rule amending Part 1611, the most prudent course of action would be to republish a revised NPRM for public comment. Accordingly, except for the retainer agreement and group eligibility sections, LSC is proposing the same revisions (with only a few, non-substantive differences) as LSC proposed in November 2002 and requests public comment thereon.

Proposed Revisions to Part 1611

While specific proposed revisions are discussed in greater detail in the Section-by-Section analysis below, it should be noted that the proposed revisions reflect several overall goals of the Working Group: reorganization of the regulation to make it easier to read and follow; simplification and streamlining of the requirements of the rule to ease administrative burdens faced by LSC recipients in implementing the regulation, facilitate compliance and aid LSC in enforcement of the regulation; and clarification of the focus of the regulation on the financial eligibility of applicants for LSC-funded legal services as an issue separate from decisions on whether to accept a particular client for service. In particular, LSC is proposing to significantly reorganize and simplify the sections of the rule which set forth the various

¹ For additional discussion of the Negotiated Rulemaking Working Group, see 67 FR 70376 (November 22, 2002).

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requirements relating to establishment of recipient annual income and asset ceilings, authorized exceptions and determinations of eligibility. These changes are intended to clarify the regulation and include substantive changes to make intake simpler and less burdensome and render basic financial eligibility determinations easier for recipients to make. LSC is also proposing to move the existing provisions on group representation, with some amendment, to a separate section of the regulation. Finally, LSC is proposing simplification and clarification of the retainer agreement requirement.

One other general issue merits discussion. Section 509(h) of the FY 1996 LSC appropriations act, P.L. 104-134, provides that, among other records, eligibility records “shall be made available to any auditor or monitor of the recipient . . . except for such records subject to the attorney-client privilege.” This provision has been retained in each subsequent appropriations measure and continues to be in force. During the prior stages of this rulemaking, there had been some discussion and consideration of having this language expressly incorporated into Part 1611. LSC continues to believe that, as 509(h) covers significantly more than eligibility records, having a full discussion of the meaning of 509(h) in the context of 1611, which addresses only financial eligibility issues, is not appropriate. Accordingly, LSC does not propose to include regulatory language implementing 509(h) with respect to records covered by this Part. For a fuller discussion of this issue, see the preamble to the November 22, 2002 NPRM, 67 FR 70376.

Title of Part 1611

LSC proposes to change the title of Part 1611 from “Eligibility” to “Financial Eligibility.” This proposed change is intended, first, to make clear that with respect to individuals seeking LSC-funded legal assistance, the standards of this part deal only with the financial eligibility of such persons. LSC believes this change will help clarify that a finding of financial eligibility under Part 1611 does not create an entitlement to service. Rather, financial eligibility is merely a threshold question and the issue of whether any otherwise eligible applicant will be provided with legal assistance is a matter for the recipient to determine with reference to its priorities and resources. In addition, this part does not address eligibility based on citizenship or alienage status; those eligibility requirements are set forth in Part 1626 of LSC’s regulations, Restrictions on Legal Assistance to Aliens.

Section-by-Section Analysis

Section 1611.1 - Purpose

LSC is proposing to revise this section to make clear that the standards of this part concern only the financial eligibility of persons seeking LSC-funded legal assistance and that a finding of financial eligibility under Part 1611 does not create an entitlement to service. In addition, LSC proposes to remove the language in the current regulation referring to giving preferences to “those least able to obtain legal assistance.” Although the original LSC Act contained language indicating that recipients should provide preferences in service to the poorest among applicants, that language was deleted when the Act was reauthorized in 1977 and has

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remained out of the legislation ever since. Moreover, section 504(a)(9) of the FY 1996 appropriations act, Pub. L. 104-134 (incorporated by reference in the current appropriations act and implemented by regulation at 45 CFR Part 1620) provides that recipients are to make service determinations in accordance with written priorities, which take into account factors other than the relative poverty among applicants. Thus, as there is no statutory basis for a preference for those least able to afford assistance and because LSC believes that the regulation should focus on financial eligibility determinations without reference to issues relating to determinations by a recipient to provide services to a particular applicant, such language should be removed from the regulation. LSC also proposes to add language specifying that this Part also sets forth financial standards for groups seeking legal assistance supported by LSC funds. Finally, LSC proposes to include a reference to the retainer agreement requirement in the purpose section to provide a notice at the beginning of the regulation that this subject is included in Part 1611.

Section 1611.2 – Definitions

LSC proposes to add definitions for several terms and to amend the definitions for each of the existing terms currently defined in the regulation. LSC believes that the new definitions and the amended definitions will help to make the regulation more easily comprehensible.

Section 1611.2(a) – Advice and Counsel

LSC proposes to add a definition of the term “advice and counsel” as that term appears in proposed section 1611.9, Retainer Agreements. Under the proposed definition, “advice and counsel” would be defined as limited legal assistance that involves the review of information relevant to the client’s legal problem(s) and counseling the client on the relevant law or action(s) to take to address the legal problem(s). LSC anticipates that advice and counsel would generally be characterized by a one-time or very short term relationship between the attorney and the client. Advice and counsel does not encompass drafting of documents or making third-party contacts on behalf of the client. Thus, for example, advising a client of what notice a landlord is required to provide to a tenant before evicting the tenant would fall under “advice and counsel,” but making a phone call to a landlord to prevent the landlord from evicting a tenant would not be considered “advice and counsel.”

Section 1611.2(b) - Applicable Rules of Professional Responsibility

LSC proposes to add a definition of the term “applicable rules of professional responsibility” as that term appears in proposed sections 1611.8, Change in Financial Eligibility Status and 1611.9, Retainer Agreements. This definition is intended to make clear that the references in the regulation refer to the rules of ethics and professional responsibility applicable to attorneys in the jurisdiction where the recipient either provides legal services or maintains its records.

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Section 1611.2(c) – Applicant

Consistent with the intention throughout to keep the focus of the regulation on the standards and criteria for determining the financial eligibility of persons seeking legal assistance supported with LSC funds, LSC proposes to use the term “applicant” throughout the regulation to emphasize the distinction between applicants, clients, and persons seeking or receiving assistance supported by other than LSC funds. Accordingly, LSC proposes to add a definition of applicant providing that an applicant is an individual seeking legal assistance supported with LSC funds. Groups, corporations and associations would be specifically excluded from this definition, as the eligibility of groups would be addressed wholly within proposed section 1611.6.

Recipients currently may provide legal assistance without regard to a person’s financial eligibility under Part 1611 when the assistance is supported wholly by non-LSC funds. LSC does not propose to change this (in fact, LSC proposes to restate this principle in proposed section 1611.4(a)) and believes that the use of the term applicant as proposed herein will help to clarify the application of the rule.

Section 1611.2(d) - Assets

LSC proposes to add a definition of the term assets to the regulation. The proposed definition, “cash or other resources that are readily convertible to cash, which are currently and actually available to the applicant,” is intended to provide some guidance to recipients as to what is meant by the term assets, yet provide considerable latitude to recipients in developing a description of assets that addresses local concerns and conditions. The key concepts intended in this definition are (1) ready convertibility to cash; and (2) availability of the resource to the applicant.

Although the term is not defined in the regulation, current section 1611.6(c) states that “assets considered shall include all liquid and non-liquid assets. . . .” The intent of this requirement is that recipients are supposed to consider all assets upon which the applicant could draw in obtaining private legal assistance. While there was no intent to change the underlying requirement, in discussing the issues of assets and asset ceilings in the Working Group it became apparent that the terms “liquid” and “non-liquid” were obscuring understanding of the regulation. To some, the term “non-liquid” implied something not readily convertible to cash, while to others the term implied an asset that was simply something other than cash, without regard to the ease of converting the asset to cash. Thus, the Working Group decided that the terms “liquid” and “non-liquid” should be eliminated and that the regulation should focus instead on the ready convertibility of the asset to cash.

The other key concept in the definition of asset is the availability of the resource to the applicant. Although the current regulation notes that the recipient’s asset guidelines “shall take into account impediments to an individual’s access to assets of the family unit or household,” the Working Group was of the opinion that this principle could be more clearly articulated. LSC believes that the proposed language accomplishes that purpose.

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Section 1611.2(e) – Brief Services

LSC proposes to add a definition of the term “brief services” as it is used in proposed section 1611.9, Retainer Agreements. LSC notes that brief services is legal assistance characterized primarily by being distinguishable from both extended service and advice and counsel. Under the proposed definition, brief service is the performance of a discrete task (or tasks) which are not incident to continuous representation in a case but which involve more than the mere provision of advice and counsel. Examples of brief services would include activities such as the drafting of documents or personalized assistance with the completion of pleadings being prepared and filed by *pro se* litigants, and making limited third-party contacts on behalf of a client in a short time period.

Section 1611.2(f) - Extended Service

LSC proposes to add a definition of the term “extended service” as that term is used in proposed section 1611.9, Retainer Agreements. As defined, extended service would mean legal assistance characterized by the performance of multiple tasks incident to continuous representation in which the recipient undertakes responsibility for protecting or advancing the client’s interests beyond advice and counsel or brief services. Examples of extended service would include representation of a client in litigation, administrative adjudicative proceeding, alternate dispute resolution proceeding, or extended negotiations with a third party.

Section 1611.2(f) – Governmental Program for Low Income Individuals or Families

LSC proposes to change the term that is used in the regulation from “governmental program for the poor” to “governmental program for low income individuals and families.” This change is not intended to create any substantive change in the current definition, but merely reflect preferred nomenclature.

Section 1611.2(g) – Governmental Program for Persons with Disabilities

LSC is proposing to add a definition of the term “governmental program for persons with disabilities.” LSC proposes to include in the authorized exceptions to the annual income ceilings an exception relating to applicants seeking to obtain or maintain governmental benefits for persons with disabilities. Accordingly, it is appropriate to include a proposed definition for this term. The proposed definition, “any Federal, State or local program that provides benefits of any kind to persons whose eligibility is determined on the basis of mental and/or physical disability,” is intended to be similar in structure and application to the definition of the term “governmental program for low income individuals and families.”

Section 1611.2(h) – Income

LSC proposes to revise the current definition of income to refer to the total cash receipts of a “household,” instead of a “family unit” and to make clear that recipients have the discretion

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to define the term household in any reasonable manner. Currently, the definition of income refers to “family unit,” while the phrase “household or family unit” appears in the section on asset ceilings. It appears that there is no difference intended by the use of different terms in these sections and LSC believes that it is appropriate to simplify the regulation to use the same single term in each provision, without creating a substantive change in the meaning of either term. LSC proposes to use “household” instead of “family unit” because it is a simpler, more understandable term.

As noted above, LSC does not intend the use of the term “household” to have a different meaning from the current term “family unit.” Under current guidance from the LSC Office of Legal Affairs, recipients have considerable latitude in defining the term “family unit.” Specifically, OLA External Opinion No. EX-2000-1011 states:

Neither the LSC Act nor the LSC regulations define “family unit” for client eligibility purposes. The Corporation will defer to recipient determinations on this issue, within reason. Recipients may consider living arrangements, familial relationships, legal responsibility, financial responsibility or family unit definitions used by government benefits agencies, amongst other factors, in making such decisions.

LSC intends that this standard would also apply to definitions of “household” and the proposed definition would make this clear.

Field representatives on the Working Group and several comments on the November 2002 NPRM also suggested deleting the words “before taxes” from the definition of income. Such a change is desirable, they contend, because automatically deducted taxes are not available for an applicant’s use and the failure to take current taxes into account in determining income has an adverse impact on the working poor. While it is undoubtedly true that automatically deducted taxes are not available to an applicant, LSC does not believe that the definition of income is the appropriate place in the regulation to deal with this issue.

Taking the phrase “before taxes” out of the definition of income would effectively change the meaning of income from gross income to net income. The term income has meant gross income since the original adoption of the financial eligibility regulation in 1976. See 41 FR 51604, at 51606, November 23, 1976. The maximum income guidelines are based on the Department of Health and Human Services (DHHS) Federal Poverty Guidelines amounts. DHHS’ Federal Poverty Guidelines are, by law, based on the Census Bureau’s Federal Poverty Thresholds, which are calculated using gross income before taxes. 42 U.S.C. §9902(2); Office of Management and Budget Directive No. 14 (May 1978) Changing the definition of income effectively from gross to net would introduce two different uses of the term income into the regulations (one use in the income guidelines published annually by LSC in Appendix A to Part 1611 and another use in the text of the regulation). This would have significant repercussions in the application of the regulation. LSC believes that this action would cause greater confusion. None of the comments previously received supporting removal of “before taxes” from the definition of income address this issue. Moreover, LSC believes that the practical problem (that taxes, indeed, are funds unavailable to the applicant), is better addressed by considering taxes as a separate factor which can be considered by the recipient in making financial eligibility

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determinations. LSC invites comment on this issue. This matter is presented in greater detail in the discussion of proposed section 1611.5, below.

In addition, LSC proposes to move the information on what is encompassed by the term “total cash receipts” into the definition of income. LSC believes that having this information in the definition of income, rather than in a separate definition will make the regulation easier to understand, particularly as the term “total cash receipts” is used only in the definition of income. In incorporating the language on “total cash receipts,” LSC proposes to take the current definition of the term without any substantive amendment, but reorganized to make it easier to understand. Specifically, LSC proposes to separate the definition into two sentences, one of which sets forth those things which are included in total cash receipts and one which sets forth those things which are specifically excluded from the definition of total cash receipts. It is worth noting that the list of items included is not intended to be exhaustive, while the list of items to be excluded is intended to be exhaustive.

Finally, LSC wishes to restate in this preamble guidance on the treatment of Indian trust fund monies in making income determinations. Several provisions of Federal law regulate whether or not income or interests in Indian trusts are taxable or should be considered as resources or income for federal benefits. See 25 U.S.C. §§1407 – 1408; 25 U.S.C. §§117a-117c. Under the terms of those laws, LSC has determined that recipients may disregard up to \$2000 per year of funds received by individual Native Americans that are derived from income or interests in Indian trusts from being considered income for the purpose of determining financial eligibility of Native American applicants for service, and that such funds or interests of individual Native Americans in trust or restricted lands should not be considered as a resource for the purpose of LSC financial eligibility. See LSC Office of Legal Affairs External Opinion 99-17, August 27, 1999.

As noted in External Opinion 99-17, the exclusion applies only to funds and other interests held *in trust* by the federal government and investment income accrued therefrom. The following have been found to qualify for the exclusion from income in determining eligibility for various government benefits: income from the sale of timber from land held in trust; income derived from farming and ranching operations on reservation land held in trust by the federal government; income derived from rentals, royalties, and sales proceeds from natural resources of land held in trust; sales proceeds from crops grown on land held in trust; and use of land held in trust for grazing purposes. On the other hand, per capita distributions of revenues from gaming activity on tribal trust property are not protected because such funds are not held in trust by the federal government. Thus, such distributions are considered to be income for purposes of determining LSC financial eligibility.

Total Cash Receipts

LSC proposes to delete the definition of “total cash receipts,” currently at section 1611.2(h), as a separately defined term in the regulation. Rather, LSC proposes to reorganize the information contained in the definition and move it directly into the definition of “income.” As noted above, the only place the term “total cash receipts” is used is in the definition of “income”

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and LSC believes that having a separate definition for “total cash receipts” is cumbersome and unnecessary.

Section 1611.3 Financial Eligibility Policies

LSC proposes to create a new section 1611.3, Financial Eligibility Policies, based on requirements currently found in sections 1611.5(a), 1611.3(a)-(c) and 1611.6. The new section 1611.3 would address in one section recipients’ responsibilities for adopting and implementing financial eligibility policies. Under the proposed new section, the current requirement that recipients’ governing bodies have to adopt policies for determining financial eligibility would be retained. LSC proposes, however, to change the current requirement for an annual review of these policies and instead require recipients’ governing bodies to conduct triennial reviews of policies. The Working Group agreed that an annual review was unnecessary and has tended to result in rather *pro forma* reviews of policies. In contrast, a triennial review requirement would be sufficient to ensure that financial eligibility policies remain relevant and would encourage a more thorough and thoughtful review when such review is undertaken. The section would also add an express requirement that recipients adopt implementing procedures. While this is already implicit in the current regulation, LSC believes it would be better for this requirement to be expressly stated. Such implementing procedures could be adopted either by a recipient’s governing body or by the recipient’s management.

Proposed section 1611.3 would also contain certain minimum requirements for the content of recipient’s financial eligibility policies. Specifically, LSC proposes that the recipient’s financial eligibility policy must:

- specify that only applicants for service determined to be financially eligible under the policy may be further considered for LSC-funded service;
- establish annual income ceilings of no more than 125% of the current DHHS Federal Poverty Guidelines amounts;
- establish asset ceilings; and
- specify that, notwithstanding any other provisions of the regulation or the recipient’s financial eligibility policies, in assessing the financial eligibility of an individual known to be a victim of domestic violence, the recipient shall consider only the income and assets of the individual applicant and shall not consider any assets jointly held with the abuser.

In establishing income and asset ceilings, the recipient would have to consider the cost of living in the locality; the number of clients who can be served by the resources of recipient; the potentially eligible population at various ceilings; and the availability of other sources of legal assistance. With respect to assets of domestic violence victims jointly held with their abusers, this requirement applies when the applicant has made the recipient aware that he or she is a victim of domestic violence.

In addition, LSC proposes to permit recipients to adopt financial eligibility policies which provide for authorized exceptions to the annual income ceiling pursuant to proposed

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section 1611.5 and for waiver of the asset ceiling for an applicant in a particular case under unusual circumstances and when approved by the Executive Director or his/her designee. Finally, LSC proposes to permit recipients to adopt financial eligibility policies which permit financial eligibility to be established by reference to an applicant's receipt of benefits from a governmental program for low-income individuals or families consistent with proposed section 1611.4(b).

These proposed provisions are, with two exceptions, based directly on current requirements with a few substantive changes. First among the changes, recipients would no longer be required to routinely submit their asset ceilings to LSC. This requirement appears to serve little or no purpose, as compliance with this requirement has been spotty and LSC has taken no action to obtain the information from recipients which have not automatically submitted it. Moreover, the information collected is not being put to any routine use. In addition, LSC has not had a parallel requirement for the submission of income ceilings. The Working Group determined that this requirement could be eliminated without any adverse effect on program compliance with or Corporation enforcement of the regulation.

Another substantive change is that recipients would be permitted to provide in their financial eligibility policies for the exclusion of (in addition to a primary residence, as provided for in the existing regulation) vehicles, assets used in producing income (such as a farmer's tractor or a carpenter's tools) and other assets excluded from attachment under State or Federal law from the calculation of assets. In identifying other assets excluded from attachment under State or Federal law, LSC has in mind assets that are excluded from bankruptcy proceedings or other assets that may not be attached for the satisfaction of a debt, etc.

There was discussion within the Working Group about the appropriate scope of this provision. Field representatives suggested that the list of exclusions should be illustrative, and not exhaustive, allowing recipients greater discretion in developing asset ceilings. Four of the comments LSC received on the November 2002 NPRM agreed with the suggestion that the list should be illustrative rather than exhaustive. LSC, however, prefers to retain the approach in the current regulation in which the list of excludable assets is set forth *in toto*. LSC believes that this approach emphasizes the policy that most assets are to be considered and maintains a basic level of consistency nationally with respect to this issue. However, LSC does agree that the regulation could afford recipients some additional flexibility in developing asset ceilings, consistent with the policy articulated above. The Working Group believes that the proposed language meets those objectives, particularly in light of the proposed amendment to the asset ceiling waiver standard discussed below. LSC invites comment on whether the list should be illustrative or exhaustive. LSC also invites comment on whether additional specific assets should be included in the list of excludable assets and, if so, what items might be appropriate.

LSC is also proposing to change the asset ceiling waiver standard slightly. The current regulation permits waiver in "unusual or extremely meritorious situations;" the proposed rule would permit waiver in "unusual circumstances." The Working Group determined that the current language is unnecessarily stringent and that it is unclear what the difference is intended to be between "unusual" and "extremely meritorious." It was suggested in the Working Group

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that the standard should be “where appropriate.” LSC, however, felt that the regulation should continue to reflect the policy that waivers of the asset ceilings should only be granted sparingly and not as a matter of course. The Working Group agreed that the revised language accomplishes this goal, while providing some additional appropriate discretion to recipients. In addition, where the current rule requires all waiver decisions to be made by the Executive Director, LSC proposes to permit those decisions to be made by the Executive Director or his/her designee. LSC believes it is important that a person in significant authority be involved in making asset ceiling waiver decisions, but recognizes that, especially as more recipients have consolidated and now serve larger areas, it is important for recipients to have the discretion to delegate certain authority to regional or branch office managers or directors to increase administrative efficiency.

The first totally new element is the proposed language regarding victims of domestic violence. This proposal implements LSC’s FY 1998 appropriations law. Specifically, section 506 of that act provides:

In establishing the income or assets of an individual who is a victim of domestic violence, under section 1007(a)(2) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)), to determine if the individual is eligible for legal assistance, a recipient described in such section shall consider only the assets and income of the individual and shall not include any jointly held assets.

Although this law has been in effect since 1997, it has never been formally incorporated into Part 1611. This provision of law applies regardless of whether it appears in the regulation. However, incorporating this language into the regulation is appropriate, particularly in light of the goal of this rulemaking to clarify the requirements relating to financial eligibility determinations.

Finally, the proposal to permit recipients to adopt financial eligibility policies which permit financial eligibility to be established by reference to an applicant’s receipt of benefits from a governmental program for low-income individuals or families consistent with proposed section 1611.4(b) is also new. This proposal is discussed in greater detail below.

Section 1611.4 – Financial Eligibility for Legal Assistance

This proposed section would set forth the basic requirement that recipients may provide legal assistance supported with LSC funds only to those individuals whom the recipient has determined are financially eligible for such assistance pursuant to their policies, consistent with this Part. This section also contains a proposed statement that nothing in Part 1611 prohibits a recipient from providing legal assistance to an individual without regard to that individual’s income and assets if the legal assistance is supported wholly by funds from a source other than LSC (regardless of whether LSC funds were used as a match to obtain such other funds, as is the case with Title III or VOCA grant funds) and the assistance is otherwise permissible under applicable law and regulation. This proposed section would further provide that a recipient may find an applicant to be financially eligible if the applicant’s assets are at or below the recipient’s applicable asset ceiling level (or the ceiling has been properly waived) and the applicant’s

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income is at or below the recipient's applicable income ceiling, or if one or more of the authorized exceptions to the ceiling applies. These provisions are based on existing provisions found in sections 1611.3, 1611.4 and 1611.6. As revised, the new provisions do not represent a substantive change, but LSC believes having the basic statements as to who may be found to be financially eligible for assistance in one section makes the regulation much clearer. In addition, where the existing regulation uses a construction that speaks to when a recipient may provide legal assistance, the proposed new language emphasizes the point that the requirements speak only to determinations of financial eligibility and not to decisions regarding whether or not to actually provide legal assistance.

LSC also proposes to incorporate into this section a significant substantive change to the regulation. Consistent with proposed section 1611.3 as discussed above, if adopted, the regulation would permit recipients to determine an applicant to be financially eligible because the applicant's income is derived solely from a governmental program for low-income individuals or families, provided that the recipient's governing body has determined that the income standards of the governmental program are at or below 125% of the Federal Poverty Guidelines amounts. For many recipients, a significant proportion of applicants rely on governmental benefits for low-income individuals and families as their sole source of income. In order to qualify for these benefits, such persons have already been screened by the agency providing the benefits (using an eligibility determination process that is stricter than the one required under LSC regulations) and determined to be financially eligible for those benefits. In Working Group discussions, many representatives of the field noted that if they could rely on the determinations made by these agencies without having to otherwise make an independent inquiry into financial eligibility, it would substantially ease the administrative burden involved in making financial eligibility determinations.

The Working Group also noted that current LSC practice permits recipients to determine that an applicant's assets are within the recipient's asset ceiling level without additional review if the applicant is receiving governmental benefits for low-income individuals and families, eligibility for which includes an asset test. Key to this practice is that the recipient's governing body has to take some identifiable action to recognize the asset test of the governmental benefit program being relied upon. This ensures that the eligibility standards of the governmental program have been carefully considered and are incorporated into the overall financial eligibility policies adopted and regularly reviewed by the recipient's governing body. As this practice has proved efficient and effective, it was determined that a parallel process could also be adopted for income screening and that these practices should be expressly included in the regulations. It is important to note that this provision would only apply to applicants whose sole source of income is derived from such benefits. Applicants who also have income derived from other sources would be subject to an independent inquiry and assessment of financial eligibility.

Finally, in the November 2002 NPRM, LSC proposed to include in this section a provision requiring recipients to make reasonable inquiry into an applicant's financial status in making financial eligibility determinations. Upon reflection, LSC believes that this requirement is better included in proposed section 1611.7, Manner of Determining Financial Eligibility and

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has moved this proposal to that section. For a detailed discussion of this issue, see the discussion of proposed section 1611.7, below.

Section 1611.5 – Authorized Exceptions to the Annual Income Ceiling

This proposed section provides for authorized exceptions to the annual income ceiling. The proposed language, like the current language of sections 1611.4 and 1611.5, on which it is based, is permissive. A recipient would be at liberty to include some, none, or all of the authorized exceptions discussed below in its financial eligibility policies. Thus, to the extent a recipient would choose to avail itself of the authority provided in this proposed section, a recipient would be permitted to determine an applicant to be financially eligible for assistance, notwithstanding that the applicant's income is in excess of the recipient's applicable income ceiling. In making such determinations, however, the recipient would have to determine that the applicant's assets were at or below the recipient's applicable asset ceiling (or the ceiling would have had to have been waived). This requirement is consistent with the current regulation, but would be affirmatively stated for greater clarity.

Under the proposed section, there would be two situations in which an applicant's income could exceed the recipient's income ceiling without an absolute upper limit: (1) where the applicant is seeking to maintain governmental benefits for low-income individuals and families; and (2) where the executive director (or his/her designee) determines, on the basis of documentation received by the recipient, that the applicant's income is primarily committed to medical or nursing home expenses and, in considering only that portion of the applicant's income which is not so committed, the applicant would otherwise be financially eligible.

The first instance would be a new addition to the regulation. Currently, an applicant seeking to *obtain* governmental benefits for low income persons may be deemed financially eligible if the applicant's income does not exceed 150% of the LSC national eligibility level. The existing regulation, however, does not specifically address applicants seeking to *maintain* such benefits. Thus, under the current regulation, an applicant whose income is over the income ceiling but under 150% of the LSC national eligibility level may be deemed financially eligible for assistance in obtaining benefits, but not for assistance in maintaining them. Thus, the applicant seeking assistance to maintain benefits would have to be turned down, but that same applicant could then be found financially eligible for assistance to re-obtain such benefits once the benefits were lost. Accordingly, LSC proposes to address this problem in the regulation. However, unlike the situation in obtaining the benefits, in seeking to maintain benefits LSC considers an upper limit on income unnecessary since in such cases the applicant's income will necessarily be rather limited (for the applicant to have been eligible in the first place for the benefits he or she is seeking to maintain).

The second instance is taken from section 1611.5(b)(1)(B) of the current regulation addressing instances in which the applicant's income is primarily devoted to medical or nursing home expenses and does not represent a substantive change in the current regulation. LSC does propose to specify in the regulation, however, that in such cases the recipient is still required to make a determination of financial eligibility with regard to the applicant's remaining income.

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The existing regulation could be read to permit an applicant with an income of \$300,000 to be deemed financially eligible if \$250,000 of the income is devoted to nursing home expenses, notwithstanding that the applicant's remaining income is \$50,000 – substantially in excess of the income ceiling. This situation is not intended, and, indeed, LSC has no reason to believe recipients are serving such persons. However, consistent with the overall goal of clarifying the regulation, LSC believes that a requirement that an applicant must be otherwise financially eligible considering only that portion of the applicant's income which is not devoted to medical or nursing home expenses should be clearly set forth in the regulation.

LSC received two comments on the November 2002 NPRM regarding this proposed revision. Both comments asked LSC to remove the requirement that the determination that the applicant's income is primarily committed to medical or nursing home expenses be made by the Executive Director or his/her designee. These commenters argued that removing this requirement would afford recipients greater administrative flexibility in making financial eligibility determinations. One comment also argued that such a change is justified because other sections of the rule do not require determinations made by the Executive Director (or designee). The existing rule, however, does require that the Executive Director make determinations regarding whether an applicant's income is primarily committed to medical or nursing home expenses. LSC believes it is important to continue this requirement in this instance because a recipient is making a determination of financial eligibility for an applicant whose income exceeds the otherwise absolute upper limit of the income ceiling, that such a determination be made by a person in significant authority.² This is similar to the LSC view regarding decisions to waive the asset ceiling. LSC does understand, however, that it is important for recipients to have the discretion to delegate certain authority to regional or branch office managers or directors to increase administrative efficiency. This is why LSC proposes broadening the existing rule to permit the Executive Director to designate a responsible individual to make such determinations. LSC believes that this approach provides additional administrative flexibility to recipients yet is consistent with the underlying policy.

LSC also proposes to permit exceptions for certain situations in which the applicant's income is in excess of the recipient's applicable income ceiling, but does not exceed 200% of the applicable Federal Poverty Guidelines amount. At the outset, LSC notes that this section also proposes to change the current upper income limit of 150% of the LSC national income guidelines amount, which is 150% of 125% of the Federal Poverty Guidelines amounts, or 187.5% of the Federal Poverty Guidelines amounts. Under the proposed new regulation, the upper limit would increase to 200% of the Federal Poverty Guidelines amounts. This change is being proposed to further simplify the language of the regulation and to recognize the changing demographic of the legal services client base, which now increasingly includes the working poor. The Working Group discussed the fact that this action would slightly increase the pool of

² This situation is distinguishable from the other exception to the absolute income limit relating to applicants seeking to maintain governmental benefits for low income persons. As noted above, in those instances, the applicant's income will already be rather limited, even if exceeding the absolute income ceiling. In the medical/nursing home expenses situation, this may not be the case and the applicant's income may be considerably in excess of the ceiling.

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potential applicants for service but was of the opinion that this would not have a negative impact on the quantity or quality of services delivered.

Turning to the exceptions, LSC proposes to retain the current exception for individuals seeking to obtain governmental benefits for low-income individuals and families. Second, LSC proposes to add an exception for individuals seeking to obtain or maintain governmental benefits for persons with mental and/or physical disabilities. Many disability benefit programs provide only subsistence support and those individuals should be treated the same way as those seeking to obtain benefits available on the basis of financial need. However, many persons with disabilities who are eligible for disability benefits may not be particularly economically disadvantaged and should not be eligible for legal assistance simply by virtue of eligibility for such disability benefits. Therefore, those applicants must have incomes below 200% of the applicable poverty level in order to be considered financially eligible for LSC-funded services.

Finally, the proposed regulation maintains the current authorized exceptions found in the factors listed in current section 1611.5. Specifically, the recipient would be permitted to determine an applicant whose income is below 200% of the applicable Federal Poverty Guidelines amount to be financially eligible for legal assistance supported with LSC funds based on one or more enumerated factors that affect the applicant's ability to afford legal assistance. As in the current regulation, recipients would not be required to apply these factors in a "spend down" fashion. That is, although recipients would be permitted to do so, they would not be required to determine that, after deducting the allowable expenses, the applicant's income is below the applicable income ceiling before determining the applicant to be financially eligible. The regulation would also be amended to clarify that the factors apply to the applicant and members of the applicant's household. The factors proposed are identical to the ones in the current regulation, with the following exceptions:

- the factor relating to medical expenses would be restated to make clear that it refers only to unreimbursed medical expenses, but that medical insurance premiums are included;
- the factor relating to employment expenses would be reorganized for clarity and would expressly include expenses related to job training or educational activities in preparation for employment;
- the factor relating to expenses associated with age or disability would no longer refer to resident members of the family as a reference to the applicant or members of the applicant's household is proposed to be incorporated elsewhere in this section of the regulation;
- the factor relating to fixed debts and obligations would be amended to read only "fixed debts and obligations;"
- a new factor, "current taxes" would be added to the list.

With regard to "fixed debts and obligations," the current regulation provides little guidance as to what is meant by this term, except to specifically include unpaid taxes from prior years. LSC proposes to simply use the term "fixed debts and obligations," while providing guidance in the preamble as to what is encompassed by the term. LSC believes that this

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approach will provide recipients with flexibility in applying the rule, while providing more guidance than could easily be contained in regulatory text.

Prior guidance from the LSC Office of Legal Affairs has stated that, “in the absence of any regulatory definition or guidance as to the meaning of ‘fixed debts and obligations,’ the common meaning of the term applies” and that it encompasses debts fixed as to both time and amount. See Letter of November 1, 1993 from J. Kelly Martin, LSC Assistant General Counsel, to Stephen St. Hilaire, Executive Director, Camden Regional Legal Services, Inc. Examples of such “fixed debts and obligations” would include mortgage payments, child support, alimony, and business equipment loan payments. LSC intends that this term should also include rent in addition to mortgage payments. Previous OLA opinions have addressed mortgage payments but not rent and rent has, heretofore, not been considered a fixed debt. LSC now sees no rational distinction between the two for the purposes of this regulation and therefore proposes to treat these expenses in a similar manner.

The term “fixed debts and obligations,” however, is not without limit. It is not intended to include expenses, such as food costs, utilities, credit card debt, etc. These types of debts are usually not fixed as to time and amount. The Working Group considered whether there were additional factors which should be enumerated in this section and several members of the Working Group proposed adding other factors, such as utilities, to the list. Three of the comments LSC received on the November 2002 NPRM proposed adding utilities to the overall list of factors. Although, as the commenters note, applicants must pay for some measure of utilities, the same can be said for clothing and food, which are also certainly basic necessary expenses. However, these sorts of costs have never been covered by the types of expenses which recipients are generally permitted to consider in determining the ability of an applicant to afford legal assistance. With the exception of housing expenses (which fall under the heading of fixed debts and obligations, a category which does not generally include utilities because utility bills are not typically fixed as to time and amount), the other factors represent expenses for items which may not be particularly extraordinary, but which are for things other than the most basic necessities. Although LSC is not proposing adding any additional factors, LSC specifically invites comment on this matter.

Another issue which was raised in the Working Group in the context of consideration of the scope of the term “fixed debts and obligations” was the inclusion of current taxes. Prior to 1983, Part 1611 included current taxes along with past due unpaid taxes as a fixed debt. When the regulation was changed in 1983, the reference to taxes was amended to refer only to unpaid prior year taxes. This change was justified on the basis that the 1611.5 factors were intended to account only for “special circumstances” affecting the ability to afford legal assistance. See 48 FR 54201 at 54203 (November 30, 1983). However, given that other types of expenses included in the list do not seem to be particularly “special” (e.g., mortgage payments; child care expenses), LSC no longer finds this explanation persuasive. Rather, LSC believes that the exclusion of current taxes, but not prior unpaid taxes, from the list of factors which recipients’ may consider under exceptions to the income ceiling has the effect of punishing those persons who are in compliance with the law in favor of persons who are delinquent in their legal responsibility to pay taxes. Moreover, as noted above, applicants for legal services are

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increasingly the working poor. Excluding current taxes has a disproportionate effect on applicants who work versus applicants who do not work. Consequently, in the November 2002 NPRM, LSC proposed including current taxes within scope of the term “fixed debts and obligations” (as they had been prior to 1983).

When the Operations and Regulations Committee once again addressed this issue, field representatives reiterated their recommendation that the term income should be defined as income after taxes. LSC continues to believe, as noted above, that effectively defining income as net income, while the LSC income guidelines (and the underlying DHHS Federal Poverty Guidelines amounts on which the LSC guidelines are based) are calculated on the basis of gross income would make the regulation internally inconsistent. Rather, LSC believes that considering taxes a factor which can be considered by the recipient in making financial eligibility determinations addresses the practical problem raised by the commenters. However, the Committee considered current taxes as fundamentally a different kind of expense than the other expenses falling within the scope of “fixed debts or obligations.” Instead, the Committee recommended, and the Board agreed, that current taxes should be a separate category of authorized exception to the annual income ceiling. Accordingly, LSC proposes to add a new subsection (iv) to section 1611.5(a)(4). LSC invites comment on the proposed addition of the authorized exception for current taxes and on the appropriate scope and specific terminology which LSC should use to describe and define this proposed exception.

Section 1611.6 – Representation of Groups

The eligibility of groups for legal assistance supported with LSC funds was a subject of extensive discussion among both the members of the Working Group and at the 2004 and 2005 meetings of the current Operations and Regulations Committee. Prior to 1983, the regulation permitted representation of groups that were either primarily composed of eligible persons, or which had as their primary purpose the furtherance of the interests of persons in the community unable to afford legal assistance. In 1983, the regulation was amended to preclude the use of LSC funds for the representation of groups unless they were composed primarily of individuals financially eligible for service and to add a requirement that any group seeking representation demonstrate that it lacks the funds or the means to obtain the funds to retain private counsel.

During the Working Group meetings, representatives from the field proposed that LSC revise the regulation to once again permit the representation of groups which, although not primarily composed of eligible persons, have as a primary function the delivery of services to, or furtherance of the interests of, persons in the community unable to afford legal assistance. Examples of such a group might be a food bank or a rural community development corporation working to develop affordable housing in an isolated community. Field representatives noted that in such cases, there may not be local counsel willing to provide pro bono representation and that the group might not otherwise be able to afford private counsel. Further, the field representatives noted that restricting recipients to representing with LSC funds only those groups primarily composed of eligible individuals prevents them from providing legal assistance in the most efficient manner possible as other groups may be better able to accomplish results benefitting more members of the eligible community than would representation of eligible

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individuals or groups composed primarily of such individuals. Field representatives also noted that the rule requires that the group would have to provide information showing that it lacks and has no means of obtaining the funds to retain private counsel, so that the rule would not permit representation of well funded groups.

The LSC representatives were concerned that allowing the use of LSC funds to support the representation of groups not composed primarily of eligible clients would be problematic. In the examples given, the “primary function” of the group is easily discernable. It may be, however, that there is or can be a wide variety of opinion on what the “primary function” of any group is and on what is “in the interests” of the eligible client community. The LSC representatives were concerned that the risk and effort related to articulating and enforcing a necessarily subjective standard would be inappropriate. Rather, LSC representatives were of the opinion that already scarce legal services resources would be better devoted to providing assistance to eligible individuals or groups of eligible individuals. In the end, the Working Group did not achieve consensus on this issue and the Draft NPRM did not propose to permit the representation of groups other than those primarily composed of eligible individuals.

In its deliberations on the Draft NPRM, the Operations and Regulations Committee acknowledged the legitimacy of the concerns of the LSC representatives, but determined that the value of permitting the representation of groups having a primary function of providing services to, or furthering the interests of, those who would be financially eligible outweighed any risks attendant upon such representation. In approving the recommendation of the Committee, the Board directed that the Draft NPRM be amended to propose permitting such representation (including any conforming amendments necessary) prior to publication of the NPRM for comment. The NPRM published in November 2002 reflected this direction.

When the new Operations and Regulations Committee considered this issue, field representatives once again supported changing the regulation to permit the representation of groups having as their primary function the provision of services to, or furthering the interests of, those who would be financially eligible (providing the group could demonstrate its inability to afford to retain private counsel), while LSC Management initially once again supported permitting only the representation of groups primarily composed of eligible individuals. However, upon further reflection and consideration of the arguments made by the field and the comments made by members of the Operations and Regulation Committee, LSC Management ultimately recommended that the regulation could be broadened to permit the representation, in addition to groups primarily composed of eligible individuals, groups which have as a primary activity the delivery of services to persons who would be eligible. Management continued to recommend that the regulation not permit the representation of groups whose primary activity is the “furtherance of the interests of” persons who would be eligible.

The Board agreed that permitting LSC recipients to use LSC funds for the representation of groups which provide services to low income persons is consistent with the LSC mission and could be an efficient use of LSC resources, provided that the legal assistance is related to the services the group provides. The Board also agreed that extending the permissible use of LSC funds for the representation of groups whose primary activity is the “furtherance of the interests

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of” low income persons would not be appropriate because of the necessarily subjective nature of determining what is in the “furtherance of the interests of” low income persons.

Accordingly, the proposed rule would permit a recipient to provide legal assistance supported with LSC funds to a group, corporation, association or other entity if the recipient has determined that the group, corporation, association or other entity lacks and has no practical means of obtaining private counsel in the matter for which representation is sought and either:

- (1) the group, or for a non-membership group, the organizing or operating body of the group, is primarily composed of individuals who would be financially eligible for legal assistance under the Act; or
- (2) the group has as a principal activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance and the legal assistance sought relates to such activity.

The first instance, relating to the eligibility and representation of groups composed primarily of eligible individuals, represents the current practice permitted by current section 1611.5(c). The proposed rule is intended to have the same interpretation of “primarily composed” that has developed and been adopted in practice over the years since 1983. In the case of membership groups, at least 51% of the members would have to be individuals who would be financially eligible; in the case of non-membership groups, at least 51% of members of the governing body would have to be individuals who would be financially eligible. The latter instance represents a variation on one of the situations permitted by the pre-1983 rule, although the language would be revised to focus on “principal activity” rather than “primary purpose” and the rule would only permit the representation of groups which have as a principal activity the delivery of services to low income persons.

Limiting permissible representation to groups whose principal “activity” is the provision of services to low income persons and the exclusion of “furtherance of the interest of the poor” groups are intended to make the analysis required in determining the permissibility of the representation more objective. In addition, LSC proposes that the regulation specify that the legal assistance must be related to the services delivered by the group. These limitations are intended to avoid creating a potential situation whereby recipients might feel free to undertake broad based, systemic social change activities. Rather, LSC believes that these limitations will help ensure that LSC funds will be used to provide financially eligible groups with the day-to-day legal services which are the hallmark of LSC-funded legal assistance.

The Office of Inspector General (OIG) has expressed concerns with the proposed provisions permitting the representation of groups. First, the OIG has raised a question as to whether permitting the representation of groups not comprised of eligible clients may exceed the Corporation’s authority under the LSC Act. The OIG argues that the LSC authorizes LSC to provide financial assistance to qualified program furnishing legal assistance to “eligible clients” and that the legislative history indicates that permissible representation of groups as “eligible clients” only includes groups of individually eligible clients. For example, the OIG notes the following statement from the legislative history of the 1997 Amendments to the LSC Act: “[t]he

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Committee expects that pursuant to guidelines issued by the corporation, recipients shall provide appropriate legal assistance to eligible clients and *organizations of eligible clients.*” H. Rep. No. 247, 93rd Cong., 1st Sess., p.12 (1973) (emphasis added). Although LSC appreciates the OIG concern, LSC believes that the proposed regulatory requirements are consistent with the applicable laws. The LSC Act, on its face, does not prohibit the representation of groups other than those composed of otherwise eligible individuals. The Act only speaks to “eligible clients” and there is nothing in the text of the Act which suggests that a group which has as its primary activity the provision of services to persons who would be eligible for LSC-funded legal assistance is necessarily excluded from the scope of the term “eligible clients.” In addition, LSC believes that the legislative history of the Act and the 1977 LSC Act amendments is not dispositive on the issue of whether the statute was intended to prohibit the representation of groups other than those comprised of eligible individuals. Rather, support for the notion that Congress contemplated the provision of legal assistance to groups providing services to eligible clients can be seen in the comments Senator Riegle made in discussing an amendment relating to the prohibition by recipients on organizing:

A similar clarification is made in section 9(c)[of the Senate Reauthorization Bill] regarding the prohibition on organizing activities. Legal Services should not directly organize groups. *However*, it should provide full representation, education and outreach to those organized groups who are made up of *or which represent* eligible clients.

Congressional Record of October 10, 1977, p. S 16804. (emphasis added).

The OIG also suggests that the regulation should define a “group.” LSC does not believe that adding a definition of group is necessary. The standard, common understanding of the terms used in the proposed regulation (group, corporation, association or entity) appear to be sufficient. Since the original adoption of the financial eligibility regulation, LSC has not encountered interpretive or enforcement problems arising out of a misunderstanding of or difference of opinion between LSC and recipients about what constitutes a group.

LSC proposes to add a provision to the regulation specifying the manner of determining the eligibility of groups. Although the practice has been that recipients must collect information that reasonably demonstrates that the group meets the eligibility requirements set forth in the regulation, standards for determining and documenting the eligibility of groups has not previously been specifically addressed in the regulation. LSC Management does not believe that recipients are representing ineligible groups, but the Working Group was nevertheless in agreement that it is important and appropriate for the regulation to expressly state the Corporation’s expectations in this area.

The November 2002 NPRM would have required a recipient to collect information reasonably demonstrating that the group meets the eligibility requirements set forth in the regulation. In written comments filed in response to the November 2002 NPRM, and again in the course of the new Operations and Regulation Committee’s 2004 and 2005 deliberations, the OIG expressed concern that the proposed rule was inadequate regarding how the eligibility of

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group clients is to be determined because the proposal did not sufficiently implement the Act's financial eligibility requirements. LSC respectfully disagrees on this point; the principal criterion for LSC-funded legal assistance is that the applicant be financially unable to afford legal assistance (*see*, S. Rep. 495, 93rd Cong., 1st Sess., p.14 (1973)) and the specific factors listed in Section 1007(a)(2) of the Act are all aspects of the applicant's ability to afford legal assistance. Although the November 2002 proposed financial eligibility standards for groups effectuated this principal criterion and were in no way inconsistent with section 1007(a)(2), LSC does agree with the OIG that the standards for determining the eligibility of groups can and should be more specific than those set forth in the November 2002 NPRM.

Accordingly, in assessing the eligibility of a group, LSC proposes to require recipients to consider the resources available to the group, such as the group's income and income prospects, assets and obligations. For a group primarily composed of individuals who would be financially eligible for LSC-funded legal assistance under the Act, would also have to consider whether the characteristics of the persons primarily comprising the group are consistent with financial eligibility under the Act. For a group having as a primary activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance under the Act, the recipient would have also to consider whether the characteristics of the persons served by the group are consistent with financial eligibility under the Act and whether the legal assistance sought relates to the the primary activity of the group. Finally, LSC proposes to require a recipient to document group eligibility determinations by collecting information that reasonably demonstrates that the group meets the eligibility criteria set forth herein.

The OIG remains concerned that the the proposed rule, even as revised, provides an undefined "reasonableness" standard for group clients that fails to provide adequate standards for documentation. The Act prescribes no particular standards for documentation of determinations of financial eligibility. The proposed standards specify the kinds of information LSC expects recipients to review to make informed determinations that the basic eligibility standards as set forth in the regulation have been met. Although LSC appreciates that a "reasonableness" standard may not be as definite as would be ideal, given the range of groups which may be clients, the development and imposition of more specific standards for documentation would be impracticable and would be likely to result in the practical impossibility of representing many otherwise eligible group clients.

LSC further notes that the proposed rule would, essentially, codify the current practice relating to both making financial eligibility determinations and documentation of financial eligibility determinations related to groups primarily composed of eligible individuals. In LSC's experience, the practical standards which LSC proposes to memorialize has not proven to be problematic. Moreover, LSC does not see why they would prove any more problematic for demonstrating or documenting the financial eligibility of groups which have as a primary activity the delivery of services to those who would be financially eligible for legal assistance.

In addition, the proposed rule would retain and restate the current provision of the rule that these requirements apply only to a recipient providing legal assistance supported by LSC

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funds, provided that regardless of the source of funds used, any legal assistance provided to a group must be otherwise permissible under applicable law and regulation.

LSC notes that, as with other aspects of this rule, proposed section 1611.6 does not speak to eligibility of groups for legal assistance under other applicable law and regulation. For example, the eligibility of a group under proposed section 1611.8 does not address issues related to the eligibility of the group under Part 1626 of LSC's regulations, concerning citizenship and alien status eligibility. Similarly, the fact that a recipient may determine a group to be eligible for legal assistance under this Part, does not address other questions relating to permissibility of the representation (i.e., this Part does not confer authority for the representation of a group on restricted matters, such as class action lawsuits or redistricting matters, etc.)

Finally, LSC notes that in the November 2002 NPRM, this proposed section was numbered 1611.8 and placed at the end of the proposed regulation. LSC is now proposing to place this section before the sections on Manner of Determining Financial Eligibility and Change in Financial Eligibility Status as both of those sections are applicable to both groups and individual applicants and clients.

Section 1611.7 – Manner of Determining Financial Eligibility

LSC proposes several revisions to this section. First, LSC proposes to include a requirement that, in making financial eligibility determinations, a recipient shall make reasonable inquiry regarding sources of the applicant's income, income prospects and assets and shall record income and asset information in the manner specified for determining financial eligibility in proposed section 1611.6. This requirement would replace the process currently required by section 1611.5, whereby a recipient is effectively required to conduct a lengthy and often cumbersome inquiry as to the applicant's income, assets and income prospects, including inquiry into a detailed list of factors relating to an applicant's specific financial situation and ability to afford private counsel. The Working Group discussed this issue at length and representatives of the field noted that conducting such a detailed inquiry in most cases is a task which is often difficult to accomplish efficiently at the point of intake, especially as much of intake is performed by volunteers, interns or receptionists. Rather, many recipients, in practice, conduct a somewhat abbreviated version of the otherwise required process, inquiring into current income, assets, income prospects and probing for additional information based on the responses provided, the requirements of the regulation and their knowledge of local circumstances. This approach, the field representatives noted, is less prone to error and assists in fostering an appropriate attorney-client relationship with individuals accepted as clients. As LSC is not finding widespread instances of service being provided to financially ineligible persons, it was agreed that that the process required by the existing regulation is unduly complicated and that the simplified requirement proposed would be adequate to ensure that recipients are making sufficient inquiry into applicants' financial situations to determine financial eligibility status under the regulation while being less administratively burdensome for recipients and more conducive to the development of the attorney-client relationship. LSC also believes that adoption of the proposed streamlined financial eligibility determination process will aid the Corporation in conducting compliance reviews.

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As noted above, LSC originally proposed in the November 2002 NPRM, to include this provision in proposed section 1611.4, Financial Eligibility for Legal Assistance. Upon reflection, LSC believes that as this requirement is really a requirement as to how financial eligibility determinations are to be made, it is better included in this proposed section on the manner of determining financial eligibility. LSC believes that this will improve the organization and clarity of the regulation.

Second, LSC proposes to delete the requirement in existing paragraph (a) of this section that LSC eligibility forms and procedures must be approved by the Corporation. It has been LSC's experience that receiving the forms has not enhanced its ability to conduct oversight of recipients. These documents are readily available to LSC from recipients when needed. This requirement appears only to create unnecessary work for recipients and LSC staff without serving any policy purpose.

LSC also proposes to add a provision to the regulation making clear that a recipient agreeing to extend legal assistance to a client referred from another recipient may rely upon the referring recipient's determination of financial eligibility, provided that the referring recipient provides and the receiving recipient retains a copy of the eligibility form documenting the financial eligibility of the client. This is the currently accepted practice, but is addressed nowhere in the existing regulation.

Section 1611.8 – Change in Financial Eligibility Status

LSC proposes to add language to this section to provide that if a recipient later learns of information which indicates that a client never was, in fact, financially eligible, the recipient must discontinue the representation consistent with the applicable rules of professional responsibility. This addition is being proposed because sometimes, after an applicant has been accepted as a client, the recipient discovers or the client discloses information that indicates that the client was not, in fact, financially eligible for service. This situation is not covered by the existing regulation because the client may not have experienced a change in circumstance but rather, the recipient has discovered new pertinent information about the client. LSC notes that the proposed language, like the current regulation, is not intended to require a recipient to make affirmative inquiry after accepting an applicant as a client for information that would indicate a change in circumstance or the presence of additional information regarding the client's financial eligibility.

The proposed regulation would require that when a client is found to be no longer financially eligible on the basis of later discovered information, the recipient shall discontinue representation supported with LSC funds, if discontinuing the representation is not inconsistent with applicable rules of professional responsibility. This proposed language is parallel to the current requirement regarding discontinuation of representation upon a change in circumstance. LSC wishes to note that, to the extent that discontinuation of representation is not possible because of professional responsibility reasons, a recipient may continue to provide representation

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supported by LSC funds. This is currently the case and LSC intends to make no change in the regulation on this point.

In addition, LSC proposes to change the name of this section from “change in circumstances” to “change in financial eligibility status” to reflect the addition of the later discovered information provision.

Section 1611.9 – Retainer Agreements

The retainer agreement requirement, found at section 1611.8 of the existing regulation, was the subject of significant discussion in the Working Group. Representatives of the field agreed with the LSC representatives that a retainer agreement may be appropriate under certain circumstances, but argued that this regulatory requirement is not required by statute, is not justified under applicable rules of professional responsibility, may be unnecessarily burdensome in some instances and is not related to financial eligibility determinations. They contended that, barring a statutory mandate, decisions about the use of retainer agreements, like those involving many other matters relating to the best manner of providing high quality legal assistance, should be determined by a recipient’s Board, management and staff, with guidance from LSC. They urged LSC to delete this requirement. The LSC representatives, however, were of the opinion that the existing provision in the regulations requiring the execution of retainer agreements is professionally desirable, authorized in accordance with LSC’s mandate under Section 1007(a)(1) of the Act to assure the maintenance of the highest quality of service and professional standards, and appropriate to assure that there are no misunderstandings as to what services are to be rendered to a particular client. Retainer agreements protect the attorney and recipient in cases of an unfounded malpractice claim and protect the client if the attorney and the recipient should fail to provide legal assistance measuring up to professional standards. In the end, the Working Group was unable to reach consensus on this issue and the Draft NPRM retained a provision generally requiring the execution of retainer agreements, along with proposing requirements for client service notices and PAI referral notices in lieu of retainer agreements under certain circumstances.

After deliberations on the Draft NPRM, the Board determined to propose elimination of the retainer agreement requirement altogether and the November 2002 NPRM published by LSC reflected this determination. With the exception of the comments of the LSC OIG, all of the comments LSC received supported the elimination of the retainer agreement requirement.

With the appointment of the new members of the Board of Directors and the new LSC President, LSC had the opportunity to reconsider this proposal. Field representatives reiterated their support for elimination of the retainer agreement requirement from the regulation, while LSC Management reiterated its support for retention of a retainer agreement requirement for extended service in the regulation, with certain amendments intended to clarify and streamline the requirement. The Board agrees with Management. LSC is committed to keeping a retainer agreement requirement in the regulations. LSC considers the practice of providing retainer agreements to be professionally desirable and in accordance with its mandate under Section 1007(a)(1) of the Act to assure the maintenance of the highest quality of service and professional

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standards and to assure that there are no misunderstandings as to what services are to be rendered to a particular client. Retainer agreements protect the attorney and recipient in cases of an unfounded malpractice claim and protect the client if the attorney and the recipient should fail to provide legal assistance measuring up to professional standards.

LSC agrees, however, that there are changes that can be made in the retainer agreement requirement to clarify the application of the requirement and to lessen the burden on recipients, without interfering with the underlying goals of the requirements. First, LSC believes that it is not necessary for LSC to approve retainer agreements and proposes to remove the requirement at current section 1611.8(a) that retainer agreements be in a form approved by LSC. Instead, LSC proposes to require the retainer agreements must be in a form consistent with the local rules of professional responsibility and must contain statements identifying the legal problem for which representation is being provided and the nature of the legal services to be provided. LSC believes that this simplification will eliminate possible sources of confusion for recipients in drafting retainer agreements, yet will continue to foster the essential communication between the recipient and the client.

Second, LSC proposes to clarify the circumstances in which retainer agreements are required. Under current section 1611.8(b) a recipient is not required to execute a retainer agreement “when the only service to be provided is brief advice and consultation.” Although the plain language of this provision would seem to encompass situations in which the attorney is providing only some information and guidance on a suggested course of action to the client, it has over the years, come to include brief services such as drafting simple documents or making limited contacts (by phone or in writing) with third parties, such as a landlord, an employer or a government benefits agency, on behalf of the client. The discrepancy between the plain language and the practical meaning of the exception should be corrected.

During the public deliberations on this matter in the 2004 and 2005 Operations and Regulations Committee meetings, LSC considered different approaches to resolving the discrepancy between the regulation as written and the prevailing practice. Field representatives suggested in the event that a retainer agreement requirement remains in the rule (although still preferring the elimination of any such requirement) that the language of the exception should reflect the current practice by expressly including brief service type activities along with advice and counsel. They asserted that the proposed rule should add no new administrative or regulatory burdens on recipients. While recognizing the value of retainer agreements in some circumstances, the field representatives also argued that the rules of professional responsibility in most jurisdictions do not require that a retainer agreement be executed or that any other form of notice be provided in the brief service context. Although LSC Management expressed the belief that while some form of written communication between the attorney and the client in brief services cases about the nature of the relationship and a clear understanding as to what services are to be rendered is important to achieving the highest quality of legal service and professional standards, it ultimately recommended against requiring grantees to provide specific written communications to clients when only brief services are being provided. After considering all of the various arguments on this matter in LSC has determined that, on balance, written communications in brief services cases represents a “best practice” and, for the purposes of a

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regulatory requirement, the current practice by which retainer agreements are only required when the recipient is providing extended service to the client is appropriate.

Accordingly, LSC proposes to require that recipients must execute retainer agreements when providing extended services to clients. Extended service is characterized by the performance of multiple tasks incident to continuous representation in a case. Examples of extended service would include representation of a client in litigation, an administrative adjudicative proceeding, alternative dispute resolution proceeding, and more than brief representation of a client in negotiations with a third party. In addition, LSC proposes to retain the provision in the current regulation that the retainer agreement must be executed when representation commences or as soon thereafter as is practicable.

To further clarify the regulation, LSC proposes to include express language specifying that recipients are not required to execute retainer agreements if the only services being provided are advice and counsel or brief service. Advice and counsel is characterized by a limited relationship between the attorney and the client in which the attorney does no more than review information and provide information and guidance to the client. Advice and counsel does not encompass drafting of documents or making third-party contacts on behalf of the client. LSC notes also that it proposes to use the term “advice and counsel” instead of “advice and consultation” because the term “advice and counsel” is a widely understood case reporting term throughout the legal services community and LSC believe that use of the standard term will be simpler and clearer. Brief service is the performance of a discrete task (or tasks) which are not incident to continuous representation in a case but which involve more than the mere provision of advice and counsel. Examples of brief service would include activities, such as the drafting of documents such as a contract or a will for a client or the making of one or a few third-party contacts on behalf of a client in a narrow time period. In advice and counsel and brief service cases, the interaction between the recipient and the client is generally limited in nature and duration so that executing a retainer agreement is administratively burdensome. In these situations it may take more time and effort for the recipient to prepare the retainer and ensure that the client has signed and returned an executed copy of the retainer agreement to the recipient than it takes for the recipient to provide the service to the client. At that point, the benefit of having the executed retainer agreement is outweighed by the effort required to comply with the requirement.

Another issue raised in the Working Group discussions was the application of the retainer agreement requirement to the cases handled by private attorneys pursuant to a recipient’s private attorney involvement (PAI) program under 45 CFR Part 1614. LSC has consistently interpreted the retainer agreement requirement as applying to cases handled by private attorneys pursuant to a recipient’s PAI program and OLA has advised recipients that the best course of action is to have the client execute retainer agreements with both the recipient and with the private attorney (OLA Opinion 99-03, August 9, 1999). Recipients have reported that entering into retainer agreements with clients with whom it does not have on-going direct relationships does not further the goal of the retainer agreement requirement and that ensuring that retainer agreements be executed between clients and private attorneys is unduly administratively burdensome. LSC agrees.

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The application of the retainer agreement requirement comes from the current structure of the text of the regulation. Under the current regulation, a recipient is required to execute a retainer agreement (unless otherwise excepted) “with each client who receives legal services from the recipient.” Cases referred to private attorneys pursuant to a recipient’s PAI program remain cases of the recipient and the clients in those cases remain clients of the recipient and the client is considered to be receiving some legal services from the recipient. However, by amending the language of the text of the regulation to say that the recipient is only required to execute a retainer agreement “when the recipient is providing extended service to the client” the necessity of applying the requirement to PAI cases is removed. In cases handled by PAI attorneys, although the client can be said to be receiving some legal services from the recipient, the recipient is not providing *extended* services. Although this change to the language alone could arguably be sufficient to remove the necessity of applying the retainer agreement requirement to cases being handled by PAI attorneys, LSC believes the text of the regulation should be further clarified to explicitly so state. Accordingly, LSC proposes to add a statement to the regulation providing that no written retainer agreement would be required for legal services provided to the client by a private attorney pursuant to 45 CFR Part 1614.

List of Subjects in 45 CFR Part 1611

Legal services.

For reasons set forth in the preamble, LSC proposes to revise 45 CFR part 1611 to read as follows:

PART 1611—FINANCIAL ELIGIBILITY

Sec.

1611.1 Purpose

1611.2 Definitions

1611.3 Financial Eligibility Policies

1611.4 Financial Eligibility for Legal Assistance

1611.5 Authorized Exceptions to the Recipient's Annual Income Ceiling

1611.6 Representation of Groups

1611.7 Manner of Determining Financial Eligibility

1611.8 Changes in Financial Eligibility Status

1611.9 Retainer Agreements

Authority: 42 U.S.C. 2996e(b)(1), 2996e(b)(3), 2996f(a)(1), 2996f(a)(2); Section 509(h) of Pub.L. 104-134, 110 Stat. 1321 (1996); Pub. L. 105-119, 111 Stat. 2512 (1998).

§1611.1 Purpose

This Part sets forth requirements relating to the financial eligibility of individual applicants for legal assistance supported with LSC funds and recipients’ responsibilities in making financial

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eligibility determinations. This Part is not intended to and does not create any entitlement to service for persons deemed financially eligible. This Part also seeks to ensure that financial eligibility is determined in a manner conducive to development of an effective attorney-client relationship. In addition, this Part sets forth standards relating to the eligibility of groups for legal assistance supported with LSC funds. Finally, this Part sets forth requirements relating to recipients' responsibilities in executing retainer agreements with clients.

§1611.2 Definitions

(a) "Advice and counsel" means legal assistance that is limited to the review of information relevant to the client's legal problem(s) and counseling the client on the relevant law and/or suggested course of action. Advice and counsel does not encompass drafting of documents or making third-party contacts on behalf of the client.

(b) "Applicable rules of professional responsibility" means the rules of ethics and professional responsibility generally applicable to attorneys in the jurisdiction where the recipient provides legal services.

(c) "Applicant" means an individual who is seeking legal assistance supported with LSC funds from a recipient. The term does not include a group, corporation or association.

(d) "Assets" means cash or other resources of the applicant or members of the applicant's household that are readily convertible to cash, which are currently and actually available to the applicant.

(e) "Brief services" means legal assistance in which the recipient undertakes to provide a discrete and time-limited service to a client beyond advice and consultation, including but not limited to activities, such as the drafting of documents or making limited third party contacts on behalf of a client.

(f) "Extended service" means legal assistance characterized by the performance of multiple tasks incident to continuous representation. Examples of extended service would include representation of a client in litigation, an administrative adjudicative proceeding, alternative dispute resolution proceeding, extended negotiations with a third party, or other legal representation in which the recipient undertakes responsibility for protecting or advancing a client's interest beyond advice and counsel or brief services.

(g) "Governmental program for low income individuals or families" means any Federal, State or local program that provides benefits of any kind to persons whose eligibility is determined on the basis of financial need.

(h) "Governmental program for persons with disabilities" means any Federal, State or local program that provides benefits of any kind to persons whose eligibility is determined on the basis of mental and/or physical disability.

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(i) "Income" means actual current annual total cash receipts before taxes of all persons who are resident members and contribute to the support of an applicant's household, as that term is defined by the recipient. Total cash receipts include, but are not limited to, money, wages and salaries before any deduction; income from self-employment after deductions for business or farm expenses; regular payments from governmental programs for low income persons or persons with disabilities; social security payments; unemployment and worker's compensation payments; strike benefits from union funds; veterans benefits; training stipends; alimony; child support payments; military family allotments; public or private employee pension benefits; regular insurance or annuity payments; income from dividends, interest, rents, royalties or from estates and trusts; and other regular or recurring sources of financial support that are currently and actually available to the applicant. Total cash receipts do not include the value of food or rent received by the applicant in lieu of wages; money withdrawn from a bank; tax refunds; gifts; compensation and/or one-time insurance payments for injuries sustained; non-cash benefits; and up to \$2,000 per year of funds received by individual Native Americans that is derived from Indian trust income or other distributions exempt by statute.

§ 1611.3 Financial Eligibility Policies

(a) The governing body of a recipient shall adopt policies consistent with this part for determining the financial eligibility of applicants and groups. The governing body shall review its financial eligibility policies at least once every three years and make adjustments as necessary. The recipient shall implement procedures consistent with its policies.

(b) As part of its financial eligibility policies, every recipient shall specify that only individuals and groups determined to be financially eligible under the recipient's financial eligibility policies and LSC regulations may receive legal assistance supported with LSC funds.

(c)(1) As part of its financial eligibility policies, every recipient shall establish annual income ceilings for individuals and households, which may not exceed one hundred and twenty five percent (125%) of the current official Federal Poverty Guidelines amounts. The Corporation shall annually calculate 125% of the Federal Poverty Guidelines amounts and publish such calculations in the Federal Register as a revision to Appendix A to this part.

(2) As part of its financial eligibility policies, a recipient may adopt authorized exceptions to its annual income ceilings consistent with §1611.5.

(d)(1) As part of its financial eligibility policies, every recipient shall establish reasonable asset ceilings for individuals and households. In establishing asset ceilings, the recipient may exclude consideration of a household's principal residence, vehicles required for work, assets used in producing income, and other assets which are exempt from attachment under State or Federal law.

(2) The recipient's policies may provide authority for waiver of its asset ceilings for specific applicants under unusual circumstances and when approved by the recipient's Executive Director, or his/her designee. When the asset ceiling is waived, the recipient shall record the reasons for such waiver and shall keep such records as are necessary to inform the Corporation of the reasons for such waiver.

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(e) Notwithstanding any other provision of this Part or the recipient's financial eligibility policies, as part of its financial eligibility policies, every recipient shall specify that in assessing the income or assets of an individual applicant who is a victim of domestic violence, the recipient shall consider only the assets and income of the individual applicant and shall not include any assets jointly held with the perpetrator of the domestic violence.

(f) As part of its financial eligibility policies, a recipient may adopt policies that permit financial eligibility to be established by reference to an applicant's receipt of benefits from a governmental program for low-income individuals or families consistent with §1611.4(c).

(g) Before establishing its financial eligibility policies, a recipient shall consider the cost of living in the service area or locality and other relevant factors, including but not limited to:

(1) the number of clients who can be served by the resources of the recipient;

(2) the population that would be eligible at and below alternative income and asset ceilings; and

(3) the availability and cost of legal services provided by the private bar and other free or low cost legal services providers in the area.

§1611.4 Financial Eligibility for Legal Assistance

(a) A recipient may provide legal assistance supported with LSC funds only to individuals whom the recipient has determined to be financially eligible for such assistance. Nothing in this Part, however, prohibits a recipient from providing legal assistance to an individual without regard to that individual's income and assets if the legal assistance is wholly supported by funds from a source other than LSC, and is otherwise permissible under applicable law and regulation.

(b) Consistent with the recipient's financial eligibility policies and this Part, the recipient may determine an applicant to be financially eligible for legal assistance if the applicant's assets do not exceed the recipient's applicable asset ceiling established pursuant to §1611.3(d)(1), or the applicable asset ceiling has been waived pursuant §1611.3(d)(2), and:

(1) the applicant's income is at or below the recipient's applicable annual income ceiling; or

(2) the applicant's income exceeds the recipient's applicable annual income ceiling but one or more of the authorized exceptions to the annual income ceilings, as provided in §1611.5, applies.

(c) Consistent with the recipient's policies, a recipient may determine an applicant to be financially eligible without making an independent determination of income or assets, if the applicant's income is derived solely from a governmental program for low-income individuals or families, provided that the recipient's governing body has determined that the income standards of the governmental program are at or below 125% of the Federal Poverty Guidelines amounts and that the governmental program has eligibility standards which include an assets test.

§ 1611.5 Authorized Exceptions to the Annual Income Ceiling

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(a) Consistent with the recipient's policies and this Part, a recipient may determine an applicant whose income exceeds the recipient's applicable annual income ceiling to be financially eligible if the applicant's assets do not exceed the recipient's applicable asset ceiling established pursuant to §1611.3(d), or the asset ceiling has been waived pursuant to §1611.3(d)(2), and:

(1) the applicant is seeking legal assistance to maintain benefits provided by a governmental program for low income individuals or families; or

(2) the Executive Director of the recipient, or his/her designee, has determined on the basis of documentation received by the recipient, that the applicant's income is primarily committed to medical or nursing home expenses and that, excluding such portion of the applicant's income which is committed to medical or nursing home expenses, the applicant would otherwise be financially eligible for service; or

(3) the applicant's income does not exceed 200% of the applicable Federal Poverty Guidelines amount and:

(i) the applicant is seeking legal assistance to obtain governmental benefits for low income individuals and families; or

(ii) the applicant is seeking legal assistance to obtain or maintain governmental benefits for persons with disabilities; or

(4) the applicant's income does not exceed 200% of the applicable Federal Poverty Guidelines amount and the recipient has determined that the applicant should be considered financially eligible based on consideration of one or more of the following factors as applicable to the applicant or members of the applicant's household:

(i) current income prospects, taking into account seasonal variations in income;

(ii) unreimbursed medical expenses and medical insurance premiums;

(iii) fixed debts and obligations;

(iv) expenses such as dependent care, transportation, clothing and equipment expenses necessary for employment, job training, or educational activities in preparation for employment,;

(v) non-medical expenses associated with age or disability;

(vi) current taxes; or

(vii) other significant factors that the recipient has determined affect the applicant's ability to afford legal assistance.

(b) In the event that a recipient determines that an applicant is financially eligible pursuant to this section and is provided legal assistance, the recipient shall document the basis for the financial eligibility determination. The recipient shall keep such records as may be necessary to inform the Corporation of the specific facts and factors relied on to make such determination.

§1611.6 Representation of Groups

(a) A recipient may provide legal assistance to a group, corporation, association or other entity if it provides information showing that it lacks, and has no practical means of obtaining funds to retain private counsel and either:

(1) the group, or for a non-membership group, the organizing or operating body of the group, is primarily composed of individuals, who would be financially eligible for legal assistance under the Act; or

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(2) the group has as a principal activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance and the legal assistance sought relates to such activity.

(b)(1) In order to make a determination that a group, corporation, association or other entity is eligible for legal services as required by paragraph (a) of this section, a recipient shall consider the resources available to the group, such as the group's income and income prospects, assets and obligations and either:

(i) for a group primarily composed of individuals who would be financially eligible for LSC-funded legal assistance under the Act, whether the characteristics of the persons comprising the group are consistent with financial eligibility under the Act; or

(ii) for a group having as a primary activity the delivery of services to those persons in the community who would be financially eligible for LSC-funded legal assistance under the Act whether the characteristics of the persons served by the group are consistent with financial eligibility under the Act and whether the legal assistance sought relates to the primary activity of the group.

(2) A recipient shall collect information that reasonably demonstrates that the group, corporation, association or other entity meets the eligibility criteria set forth herein.

(c) The eligibility requirements set forth herein apply only to legal assistance supported by funds from LSC, provided that any legal assistance provided by a recipient, regardless of the source of funds supporting the assistance, must be otherwise permissible under applicable law and regulation.

§1611.7 Manner of Determining Financial Eligibility

(a)(1) In making financial eligibility determinations regarding individual applicants, a recipient shall make reasonable inquiry regarding sources of the applicant's income, income prospects and assets. The recipient shall record income and asset information in the manner specified in this section.

(2) In making financial eligibility determinations regarding groups seeking LSC-supported legal assistance, a recipient shall follow the requirements set forth in §1611.6(b) of this Part.

(b) A recipient shall adopt simple intake forms and procedures to obtain information from applicants and groups to determine financial eligibility in a manner that promotes the development of trust between attorney and client. The forms shall be preserved by the recipient.

(c) If there is substantial reason to doubt the accuracy of the financial eligibility information provided by an applicant or group, a recipient shall make appropriate inquiry to verify the information, in a manner consistent with the attorney-client relationship.

(d) When one recipient has determined that a client is financially eligible for service in a particular case or matter, that recipient may request another recipient to extend legal assistance or undertake representation on behalf of that client in the same case or matter in reliance upon the initial financial eligibility determination. In such cases, the receiving recipient is not

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required to review or redetermine the client's financial eligibility unless there is a change in financial eligibility status as described in §1611.8 or there is substantial reason to doubt the validity of the original determination, provided that the referring recipient provides and the receiving recipient retains a copy of the intake form documenting the financial eligibility of the client.

§1611.8 Change in Financial Eligibility Status

(a) If, after making a determination of financial eligibility and accepting a client for service, the recipient becomes aware that a client has become financially ineligible through a change in circumstances, a recipient shall discontinue representation supported with LSC funds if the change in circumstances is sufficient, and is likely to continue, to enable the client to afford private legal assistance, and discontinuation is not inconsistent with applicable rules of professional responsibility.

(b) If, after making a determination of financial eligibility and accepting a client for service, the recipient later determines that the client is financially ineligible on the basis of later discovered or disclosed information, a recipient shall discontinue representation supported with LSC funds if the discontinuation is not inconsistent with applicable rules of professional responsibility.

§1611.9 Retainer Agreements

(a) When a recipient provides extended service to a client, the recipient shall execute a written retainer agreement with the client. The retainer agreement shall be executed when representation commences or as soon thereafter as is practicable. Such retainer agreement must be in a form consistent with the applicable rules of professional responsibility and prevailing practices in the recipient's service area and shall include, at a minimum, a statement identifying the legal problem for which representation is sought, and the nature of the legal services to be provided.

(b) No written retainer agreement is required for advice and counsel or brief service provided by the recipient to the client or for legal services provided to the client by a private attorney pursuant to 45 CFR Part 1614.

(c) The recipient shall maintain copies of all retainer agreements generated in accordance with this section.

Appendix A--Legal Services Corporation Poverty Guidelines

Note: Appendix A: The Corporation is not requesting comments on the current Appendix. The Appendix is revised annually, after the Department of Health and Human Services issues the new Federal Poverty Guidelines for that year.

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